United States Court of Appeals for the Second Circuit



APPENDIX

75-2115

United States Court of Appeals

For the Second Circuit

Docket No. 75-2115

JOSEPH TREMARCO.

Petitioner-Appellant,

against

ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK, DISTRICT ATTORNEY FOR KINGS COUNTY, STATE OF NEW YORK, POLICE DEPARTMENT OF THE CITY OF NEW YORK, STATE OF NEW YORK, FEDERAL BUREAU OF INVESTIGATION, AND WARDEN, GREENHAVEN CORRECTIONAL FACILITY, STORMVILLE, NEW YORK,

Respondent-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX

GRUNEWALD, TURK, GILLEN & FORD

Attorneys for Appellant

233 Broadway

New York, New York 10007

(212) 964-1400





PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX

	PAGE
Docket Entries	1a
Petition for Writ of Habeas Corpus	4a
Exhibit A (Indictment)	17a
Exhibit B (Order on Appeal from Judgment of Conviction)	20a
Exhibit C (Certificate)	21a
Exhibit D (Letter dated December 4, 1972 from Clerk of the Supreme Court of the United States to Raymond B. Grunewald, Esq.)	22a
Exhibit E (Order of Dismissal)	23a
Order to Show Cause	25a
Memorandum and Order, dated May 24, 1973	27a
Letter of June 1, 1973 with enclosures	40a
Letter of September 26, 1973	47a
Motion for a New Trial or a Full Hearing dated August 20, 1974	55a
Affidavit of Michael J. Gillen in Support of Motion for a New Trial	57a
Renewed Motion for a New Trial or a Full Hearing, dated March 12, 1975	67a
Affidavit of Michael J. Gillen in Support of Motion for a New Trial	69a
Memorandum and Order, dated June 18, 1975	71a
Order dismissing petition, dated June 23, 1975	75a
Notice of Appeal	76a

DOCKET ENTRIES

TITLE OF CASE JOSEPH TREMARCO TURK & GILLEY, ESOS 16 Court St. Bklyn . N. Y ATTORNEY GENERAL OF THE UNITED STATES, UNITED 11241 STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK, DISTRICT ATTORNEY FOR KINGS COUNTY, Tel: UI-8-6464 -STATE OF NEW YORK, POLICE DEPARTMENT OF THE MA-4-3584 For Defendant: CITY OF NEW YORK, STATE OF NEW YORK, PEDERAL HUREAU OF INVESTIGATION, and WARDEN, GREENHAVEN For Defendant: CORRECTIONAL FACILITY, STORMVILLE, NEW YORK B'S.S OF ACTION: JURY TRIAL CLAIMED 5:00 100 1122 Paul ABSTRACT OF COSTS TO WHOM DUE

ortinestra.		7.7	FE
DAYE	FILINGS- PROCEEDIN 16	MEHOMYE MEHOMYE MICHUE	
2 7 72	PENTATON BILLED HOD A UD TO OF MADEAS COD BIG		13
3-7-73	PETITION FILED FOR A WRIT OF HABEAS CORPUS.	-	130
3-7-73	MEMORANDUM OF LAW FILED IN SUPPORT OF PETITION, ETC.	2	The !
3-8-73	ORDER TO SHOW CAUSE FILED with proof of service thereon;	3	*1
313	Affidavit of EILEEN BORCH filed re service upon: Attorney		184. 1
60	Gen., U.S. Department of Justice, Washington, D. C. 20530	12.5 41	
19 4	Certified No. 57442; upon the U.S.Atty., Eastern District of N.Y., upon Hon. Eugene Gold, District Atty., Kings Co.,	1 1 1 1 1	2 . Min.
W 47	Certified No. 575444; etc, (See Order, etc.) returnable	1.47	1
	March 22, 1973.		No.
3-21-73		4	1
'i	N.Y., filed in support of extension of time to answer, etc.	17世界	
322-73	Before COSTANTINO, J. Hearing on order to show cause, etc.	7. "	apres -
1 2	Case called. Adjd. to April 5, 1973 at 10:00 A.M.	1 3779	14.1
4-5-73	Before COSTANTINO, J. Case called, Hearing adjourned to		1.74
	April 12, 1973 at 10:0 0 A.M.	100	4
J-G-73	Affidavit of HILLEL HOFFMAN, Assistant Atty., Gen., State of	5	的性。
	N.Y., filed in opposition, etc.	Y	社
4-11-73	ORDER TO SHOW CAUSE FILED (with proof of service thereon)	64-	
The second	why the petition for a writ of habens corpus dated Jan 31.1973		14.
	should not be DISMISSED, eec. (returnable April 12, 1973 at 10	100.	W.
4-12-73	Before COLTANTINO, J. Hearing on order to show cause for a	1 1 1 2	
AL I	writ of habeas corpus, etc. Case called MOTION ARGUED		416
	DECISION RESERVED.	1. 八线	
12-73	Before COSTANTINO, J. Hearing on order to show cause why the	Crance	400
	petition for a writ of habeas corpus should not be dismissed.	1 1 1	k.
	Case called. Motion Argued. DECISION RESERVED.		Charles .
#-12-73	Affirmation of HELMAN R. BROOK, Assistant District Atty.,	7	1000
ir	County of Kings filed.	106 10	140
4-12-73	Memorandum of Law filed (U.3.A.)	8	在
4-12-73	Return of respondents herein filed, to writ of habeas corpus.	9 00	Mr.
5-24-73	BY COSTANTINO, J. MEMORANIUM and O DER filed. The U.S. Atty	- 76	130
The same	argues in his brief that the U.S. is not a proper party in thi	8	松似
Nº 15	proceeding. The court, however, takes the view that since it	1	
Section 1	has primary jurisdiction to issue the writ and since the U.S.	4	13
3	is the custodian of the statements in question, which are of or	uetal.	N. V
10 × 1	importance, fairness and justice mandate that the U.S. be a par	EY.	
	to this proceeding, etc. (See Memo., etc.)	- 10	Marile
6-13-73	Letter of Harold Friedman, Assistant U.S. Atty., filed re porti	on .11	(13)
COURSE STATE	CONTRACTOR OF THE PROPERTY OF	300	341300

.

DATE	FILINGS-PROCEEDINGS	PLAINT	LENK	PERS	ANT
3-74	Before COSTANTINO, J. Fotion rgued. Decision	7.		4	
300	reserved. All sides to submit briefs. (Re:			* 1	1 10
	Status report)			10	
3/6/74	Stenogjrapher's transcript of 4/3/74 filed	1 1	100	To L	
3-23-74	Notice of motion filed for an order granting JOS	EPH	TRE	ARCO,	Mi.
	petitioner herein, a new trial, etc (returnable	Sep	t.5.	1974	ings.
	Before COSTANTINO, J. Case called. MOTION adjournment. 19, 1974 - 10:00 A.M.			1	+ 1
9-19-74	Before COSTANTINO, J. Case called. Motion marke	d of	100		海
	Case referred back to the State Court for possi	ble .		1 1-15	.]
	disposition.	4.77	ñ.	11	. 1
10/4/74	Stenographer's transcript of Sept. 19, 1974 fi	led.	-		
-13-75	NOTICE OF MOTION filed for an order granting th	e per	111	Mer	
<u> </u>	herein a new trial, etc. (returnable March 21,1	975			Clair.
	Affidavit of Hillel Hoffman, Assistant Atty., Ge	n.,	1.0		7 9
	State of N.Y. filed in opposition, etc.		1. 6.7	1. 建	1;
3-24-75	Affidavit of Richard C. Laskey, Assistant Distri	CE A	-cy	, roi	, /
	County of Kings filed.	4	-		1110
3-31-75	MINUTES OF THE STENOGRAPHER FILED (March 21, 19 Before BRUCHHAUSEN, J. Case called. (Pre-Trial		ren	ce -	12-14
2-14-73	and Motion) DECISION RESERVED.			100	
5-18-76	BY BRUCHHAUSEN, J. CONORANDLY and ORDER FILED.	. 14	1	13	-
e di	PETITION IS DISHISSED. (See Memo., etc.) IT IS		-	To have	10 140 K
-	ORDERED. Copies were sent out from chambers				1
	Bruchhausen, J.			te.	11/4
6-23-75	JUDGMENT FILED. ORDERED and ADJUDGED that the	petit	ion	er ta	ke .
1	NOTHING of the respondent and that the petition			-	THE R. P.
	The same of the sa		-		-

D. C. 110

PETITION OF WRIT HABEAS CORPUS

IN THE UNITED STATES DISTRICT COURT
FOR THE BASTERN DISTRICT OF NEW YORK

JOSEPH TREMARCO,

Petitioner,

-agai 1st-

ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK, DISTRICT ATTORNEY FOR KINGS COUNTY, STATE OF NEW YORK, POLICE DEPARTMENT OF THE CITY OF NEW YORK, STATE OF NEW YORK, FEDERAL BUREAU OF INVESTIGATION, and WARDEN, CREENHAVEN CORRECTIONAL FACILITY, STORMVILLE, NEW YORK,

OF LOS CORPUS

Respondents.

To the Honorable

, United States

District Court Judge for the Bastern District of New York.

Court for a writ of habeas corpus pursuant to 28 U.S.C. Section 2241.

The petition of JOSEPH TREMARCO, respectfully shows to this Court:

- 1. Petitioner is unlawfully detained and restrained in his liberty by the above named respondents, and is now in the custody of the Warden, Greenhaven Correctional Facility, Stormville, New York by the District Attorney, Kings County, through his agents and representatives including the Attorney General, United States Attorney, and the Federal Bureau of Investigation, in violation of the Constitution and Laws of the United States.
- 2. The original cause or pretext of such detention and restraint was a warrant of arrest issued by a Judge of the Criminal Court of the City of New York sitting in and for the County of Kings or March 11, 1971. Thereafter, on March 11, 1971 a warrant of arrest was issued by a United States Magistrate for the Bastern District of

New York charging the petitioner JOSEPH TREMARCO with obstruction of justice.

A 3. On or about April 20, 1971, petitioner was indicted by a Grand Jury for the County of Kings, State of New York under Indictment No. 2164/1971, and charged with attempted murder, assault in the first degree, and possession of weapons and dangerous instruments and appliances. (A copy of the indictment is annexed hereto as Exhibit A.) Thereafter, petitioner was tried on the aforesaid indictment before a jury and the Hon. John A. Monteleone, Justice of the Supreme Court, Kings County. The jury returned a verdict of guilty on all counts on September 28, 1971.

- 4. On December 17, 1971, petitioner was sentended to a maximum term of 25 years imprisonment. Thereafter, the conviction was affirmed by the Appellate Division, Second Department on May 30, 1972 without opinion (Exhibit B), and on June 29, 1972 the New York Court of Appeals denied leave for petitioner to appeal to that Court, without opinion (Exhibit C). Petition was made for a writ of certiorari to the United States Supreme Court, which petition was denied on December 4, 1972 (Exhibit D). Petitioner has exhausted every state remedy available to him.
- charged throughout all the aforesaid proceedings and maintains now that he is innocent of the charges and that the verdict of the trial jury was not honest and true and that the verdict was the result of conscious suppression of vital evidence by the Attorney General of the United States, the United States Attorney for the Bastern District of New York, the Federal Bureau of Investigation, the District Attorney of Kings County and the New York City Police Department and their agents in direct contravention of the constitutional rights guaranteed petitioner by the United States Constitution.

- 6. The facts showing these violations of Constitutional Law are as follows:
- 7. During the hearing prior to trial before the Hon. John A.

 Monteleone and at the trial before a jury the following was elicited:

 Hearing on Motion to Suppress

People's Case

Harry Bogin, the victim of the assault herein, testified that on March 11, 1971, he left his home at 2783 Brighton 8th Street, Brooklyn, N.Y., about 7 a.m. and walked across the street where he noticed his company's truck had a flat tire. He walked to the rear of the truck, stepped onto the sidewalk and saw a man emerge from car parked in front of the truck with "what look[ed] to me like a machine gun". He got a full view of the man for "no more than a second" before turning and starting to run. He recognized the man as the same person he had seen in Federal Court in New Jersey. He heard firing and the next thing he knew he was lying on the ground across the street (H. 52-55); The next day the prosecutor entered his hospital room at Coney Island Hospital and told him that he (the prosecutor) was "bringing in someone that (he) would like me to look at". Two people then entered the hospital room with the petitioner, Tremarco, who Bogin identified as the man who shot him. He was also shown photographs of many people but could not recall whether the photos were shown to him before of after Tremarco was brought into the hospital room. Then he recognized four or five of the people depicted in the photographs and one of those people was the petitioner. He also testified that after the shooting he had told his wife that "I was shot by Tremarco" (H. 62-64).

^{*} Reference key: A. Appendix; H. Hearing before trial; T. Trial record.

On cross-examination, Bogin testified that he had no recollection of the weather conditions on March 11, 1971 (H. 73) but that to the best of his knowledge, because he was "not fully awake" it was not raining and there was no smoke, fog or haze (H. 74). A meteorologist testified that based upon the U.S. Weather Bureau reports it was raining, complete overcast with fog and haze (T. 134 to 142). That when he first saw the man coming out of the car he did not recognize him as the petitioner (H. 76) and as the man started to turn towards him he noticed the weapor in his hand (H. 77) and the man's face for under a second (H. 90). That within that second he recognized the weapon as a Thompson submachine gum, saw the man's face and ran (H. 142).

He also testified that he first saw petitioner in the latter part of 1969 or the early part of 1970, in a courtroom in New Jersey (H. 79). At that time he saw Tremarco full face when he turned around in the courtroom (H. 36) for "propably about a couple of seconds, maybe less" (H. 87). Thereafter, Bogin went to a room to be fingerprinted where he remained for approximately 25 minutes. Tremarco was with him during this time but Bogin had his own problems and was not looking at Tremarco during the entire period (H. 89). Bogin also admitted that he was shown photographs "possible two or three times" in the hospital (H. 122) and that he picked out Tremarco and another picture that had a likeness to Tremarco (H. 124). When Tremarco entered his hospital room with two other men, petitioner had handcuffs on and that he expected the man who shot him to be brought in at that time (H. 127). While in the hospital he was conscious but "not fully aware of who I was speaking to" (H. 131). He did not know how long he was awake in the hospital prior to petitioner's being brought in (H. 136).

Gerald Collins, an FBI Agent testified on direct that on March 12, 1971, at approximately 8 a.m. he went to the Newark Police Department to pick up petitioner, for arraignment on a warrant issued in the Eastern District of New York for obstruction of justice arising out of the shooting of Bogin. After arraigning Tremarco in Federal Court in Brooklyn, New York, Agent Collins went to the Coney Island Hospital where he saw Bogin. He showed Bogin 48 photographs and Bogin identified the picture of Joseph Tremarco stating "that's him". Bogin also identified a picture of Tremarco's brother and another individual stating "I can't be sure, I think I have seen this man before" (H. 168-171).

Petitioner had served subpoenas duces tecum upon the PRI and the United States Attorney's Office for the Bastern District of New York, demanding the production of the statements of the witness Harry Bogin, to the Agents of the FBI. Assistant United States Attorney Rosenthal, appeared before the trial court and moved to quash petitioner's subpoenas, citing as authority §16.11 of the Code of Federal Regulations. Mr. Rosenthal refused to produce even the limited information sought by petitioner. The Trial Court refused to compel the production of the subpoenaed records and quashed the subpoenas (H. 13-22).

Agent Collins stated that he made a report concerning the events he testified to on direct but he refused to disclose that report, claiming that the report contained information pertinent to other matters. Agent Collins refused to submit his reports to any authority, including the Court (H. 224). An exception was taken to the Court refusal to order the production of that report (H. 173). He testified that the photographs were displayed to Bogin, prior to Tremarco being brought into the room about one hour thereafter (H. 181-182).

Agent Charles Steadman of the FBI also testified as to the existence of FBI reports concerning the matter under inquiry. He also stated he would not turn over such reports even to the Court (H. 38).

Agent Collins denied having obtained the Federal warrant to assist the state in getting Tremarco from New Jersey to New York, but he admitted that he never experienced a situation where a man is arrested in one state and brought to another state to be arraigned. He also stated that when Tremarco was released without bail, he was immediately taken into custody by New York City Detectives (H. 205-211).

Raymond Bini, a New York City Patrolman testified that on March 11, 1971, he went to 2783 Brighton Eighth Street (H. 225) and spoke with Bogin who said "John Tremarco" shot him (H. 226). Thereafter the defense introduced into evidence (H. 383) Patrolman Bini's report in which he stated that an "unknown person" shot Bogin (H. 328).

Mark Steinberg testified that after the shooting Bogin said that the name of the man who shot him was "Joe Tommico" "Tinio" "Tremarco" (H. 237).

Bdward Boyd, V, an Assistant U.S. Attorney for the Eastern Dsitrict of New York testified that on March 12, 1971, Joseph Tremarco was arraigned in Federal Court in Brooklyn and released on his own recognizance. That although bail is usually requested on a charge of shooting a Federal witness it was not requested in this instance because the Federal jails were crowded and it was known that the New York City Police Department would arrest Tremarco and that the New York City Police were waiting in the magistrate's office when the defendant was brought in for arraignment (H. 294-298).

Trwin Nacht a New York City Detective testified that Bogin told him at Coney Island Hospital that "John Tremarco" shot him.

Detective Nacht also testified that Bogin told him that he believed that he would recover (H. 323).

On cross-examination Detective Nacht testified that an FBI agent told him that Tremarco would be in Federal Court in Brooklyn on March 12, 1971 (H. 341). He arrived in Brooklyn Federal Court at approximately 9 p.m. on March 12, hoping to pick up Tremarco (H. 346). He was aware that Tremarco was represented by Mr. Brown, an attorney (H. 348). After Tremarco's arraignment in Federal Court he arrested him (H. 349). He told Mr. Brown that Tremarco would be arraigned in New York City Criminal Court as soon as possible (H. 350). Instead he then accompanied Tremarco to Coney Island Hospital (H. 353) arriving there at approximately 1:30 p.m. (H. 355) and that the showup took place at approximately 4 p.m. (H. 356). He stated that photographs were shown to Bogin immediately prior to the showup (H. 362). Defense counsel was not present at the photo identification or the showup and the petitioner was not advised that he had a right to have an attorney present (H. 365-366).

Defendant's Case on the Hearing

Raymond Brown testified on direct that he is an attorney admitted to practice in the State of New Jersey and in the New York and New Jersey Federal Courts. Or March 12, 1971, another lawyer requested that he represent Mr. Tremarc: He then went to Newark Police Headquarters where he had learned that Tremarco was being held and was informed Tremarco was being taken by Federal Authorities to be arraigned. He then went to the United States Commissioner's office in Newark where Judge Schweitz/ advised him, after making a telephone call, that Tremarco was bong taken directly to Brooklyn, rather than being arraigned in Newar He ther went to the United States Commissioner's office in Brooklyn where he met Assistant United States Attorney Boyd. Mr. Boy told him that Tremarco was being turned over

to the state district attorney and introduced him to Assistant District Attorney Davenport. He asked Mr. Davenport:

"'What are you going to do?'

He said.

'We're going to book him and he will be arraigned tonight.'

I said,

'Will there be any examination, any attempt to get any statements from him or any lineups?'

He said,

'No, we won't do that.'

I said.

'If so, I'll hang around until (N.Y. counsel) shows up, otherwise if it's just going to be a booking and an arraignment, there is no purpose in holding you up, and I have other matters to attend to.'

And he said no there would not. I asked him again if there was going to be any lineup or statements and/or any examinations for identification (H. 166)."

Mr. Brown then testified that he left petitioner in the custody of Assistant District Attorney Davenport and returned to New Jersey (H. 158-167).

Mr. Davenport did not cross-examine the witness.

Evidence at Trial

People's Case

Doctor Cerrute testified regarding the serious injuries sustained (T. 32-35). Dr. Cerrute also testified that Harry Bogin was in critical condition for only the first several hours and that his "vital signs very promptly became stable... so by the following day... or that very examing we were able to transfer him to the Intensive Care Unit" (T. 32-36).

James G. Cleary testified that he was employed by the FRI.

He then testified, over objection, that on the morning of March 11, 1971
he received a telephone call from Mrs. Harry Bogin (T. 39-40).

A motion was then made to strike Mr. Cleary's testimony which the court granted on the grounds that it was inadmissible and prejudicial to petitioner (T. 40-42).

Harry Bogin testified that on March 11, 1971, he left his home at 2783 Brighton Bighth Street, at about 7:00 a.m. and went across the street and found his company truck had a flat tire. He went to the rear of the truck, stepped onto the sidewalk and saw a man emerge from a car parked in front of the truck with what "...looked like a machine gun" (T. 50-52).

On cross-examination, Bogin testified . . "it was fairly light out", not raining, no fog or haze. He stated "This was just after I got up in the morning, I'm not fully awake, . . . ", that he was functioning and a little sleepy and the morning was clear. That he saw his assailant full face for under a second. He did not recall if his assailant had a hat on, how the assailant was dressed or whether the man had an overcoat, a jacket or a sweater on (T. 63-80).

Defendant's Case

Priscilla Lodato testified that she was living with petitioner at 74 Garrison Street, Newark, New Jersey for four years. Tremarco was at her home on March 10, 1971, and that he slept there that evening.

On March 11, 1971, she and Tremarco awoke at about 7 a.m. and that petitioner showered, Shaved, had coffee and left at about 7:30 a.m.

After her children left for school, Tremarco returned with some clothes from the cleaners and then left a little after 8 a.m. (T. 84-88).

Aran Ashukain testified that he owns a dry cleaning store at 20 Pacific Street North, Newark, New Jersey. He knew petitioner all his life. After learning that Tremarco was arrested he recalled that

Tremarco was in his store on the day of his arrest. Tremarco came to pick up some dry cleaning at approximately 7:15-7:20 a.m. before his "pressers" who arrive at 7:40-7:50 arrived (T. 98-101).

John Bridges testified that he works as a mechanic at a gas station in Newark and that Tremarco was doing business with the gas station for approximately eight years. Tremarco bought gas between 7:30 and 7:45 a.m., he recalled the boy who normally pumps gas was not at work as yet (T. 117-119).

Walter F. Zeltnam, a consulting meteorologist testified based upon reports of the United States Weather Bureau for the hour of 7:00 a.m. of March 11, 1971, of observations of that date and hour at JFK Airport, La Guardia Airport, and Central Park Observatory and a table of sunrise published by the United States Naval Observatory and a weather map of the northeastern United States, published by the United States Weather Bureau, all of which were trial exhibits.

An exhibit based on observations for JFK Airport showed rain continuously from midnight to 10:00 a.m. of March 11, 1971, and fog and compleme cloud cover at 7:00 a.m. a total overcast of cloud (T. 134-140). Sunrise was at 6:15 a.m., temperature was 35 degrees (T. 142).

Observations for La Guardia Airport at 7:00 a.m. on March 11, 1971, described rain, fog and complete overcast (T. 141). Temperature 35 degrees (T. 142).

Observations from Central Park at 7:00 a.m. on March 11, 1971, disclosed rain and fog, however, cloud cover is not measured at Central Park.

The Weather Map disclosed inclement weather from Maine to Delaware (T. 142).

Louis Romeo, testified that he is a fireman for the City of Newark and also owns a restaurant tavern in Newark. He opened his restaurant tavern each day around 5:30 a.m. His restaurant is busy in

the morning before 8:00 a.m. but is slow when his customers leave for work around 8:00 a.m. On Thursday (March 11, 1971 was a Thursday) he leaves his restaurant around 8:00 a.m. to pick up fish for Friday. He saw Tremarco on his way to pick up the fish. Around 11:00 or 11:30 on the same day someone came into his restaurant and said the police were looking for Tremarco (T. 158-161).

People's Rebuttal

Detective Nacht testified that on Wednesday (September 22, 1971) at the request of the District Attorney he drove from 2783

Brighton Bighth Street in Brooklyn to 74 Garrison Street, Newark, New Jersey. He left Brighton Eighth Street at exactly 6:45 a.m. and arrived at 74 Garrison Street at exactly 7:19 a.m. The trip was 23.8 miles and took 34 minutes (T. 172-173).

On cross-examination the witness testified that the route taken (New Jersey Turnpike) showed signs of new construction but he did not know whether the new approachways were in the process of construction on March 11, 1971. The traffic on the Turnpike on that day was "flowing freely"; traffic was heavier at 7:15 a.m. than it was at 6:45 a.m.; it was not raining but rather was clear on the day he made the trip; traffic goes slower in the rain and even slower in fog; the route taken skirts the harbor; he did not know whether the New Jersey Turnpike was open or whether Routes 1 and 9 were under construction on March 11, 1971 (T. 175-180).

It was also brought out that the District Attorney had petitioner's bill of particulars claiming alibi from May 28, 1971 (T. 182).

8. The entire case against petitioner was Mr. Bogin's alleged recognition of his assailant with merely an "under a second" opportunity to view the assailant at the scene. Mr. Bogin's prior

statements to the FBI concerning the "under a second" view were vital for use in cross-examination on such a close issue. These same statements are now vital to petitioner and this Honorable Court should order their production. Petitioner is convinced these statements will controvert Bogin's trial testimony and will establish petitioner's innocence. Petitioner submits that the willful and premeditated suppression of these statements by State and Federal Authorities establishes beyond doubt a concerted effort to convict petitioner by means, fair or foul. As a result petitioner is convinced both State and Federal Authorities have suppressed exculpatory evidence which would prove petitioner's innocence of this crime beyond all doubt.

Petitioner has been denied due process of law in violation of the Fourteenth Amendment of the United States Constitution and has been denied effective counsel in violation of the Sixth Amendment of the United States Constitution by the willful suppression by State and Federal Authorities of evidence vital to his defense.

In addition, petitioner has been denied due process of law by permitting a tainted in Court identification of petitioner by the victim of the crime, by inflammatory remarks in summation by the prosecutor made without basis in the trial record, by the prosecutor calling an FBI employee as a witness merely to prejudice the jury and by submission of the case to the jury where, as a matter of law, the evidence against petitioner was insufficient.

It is prayed that this Honorable Court order the production of the entire files of the District Attorney, Kings County, the New York Lity Police Department, the Federal Bureau of Investigation and the Inited States Attorney for the Eastern District of New York.

9. Petitioner was taken into custody by Federal Authorities on March 12, 1971 and thereafter arraigned before United States



Magistrate Vincent A. Catoggio on March 12, 1971.

made to a Federal Grand Jury concerning the allegations against

Mr. Tremarco. In fact, the complaint and warrant issued by United

States Magistrate Vincent A. Catoggio upon which Mr. Tremarco was

arrested was dismissed upon motion of the Government on October 4,

1971 (71 M 405), approximately one week after the jury verdict in the

Kings County Supreme Court rendered on September 28, 1971. (Exhibit E)

It is respectfully submitted that the Government, by this device, should not be permitted to forever foreclose petitioner from the very evidence that will establish his innocence.

DAB 11. Petitioner has no other adequate remedy to attack his present illegal incarceration.

12. No previous application has been made for the Writ herein asked for.

Wherefore, your petitioner respectfully prays (1) that a writ of Habeas Corpus be granted and an order entered discharging him from custody, or in the alternative, that respondents be ordered to show cause why petitioner should not be discharged from custody; and (2) that respondents produce all the records, statements of witnesses, reports of investigations, facts and exhibits in their possession or under their control pertaining to petitioner's incarceration; and (3) that this Court grant such other, further and different relief as to this Court may seem just and proper under the circumstances.

Dated: Stormville, New York

JAN 3) , 1973

JOSEPH TREMARCO

EXHIBIT A (INDICTMENT)

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH TREIGREO

Defendant

FIRST COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant of the crime of ATTEMPTED NUMBER

committed as follows:

The defendant, being aided by another person actually present, on or about March 11, 1971, in the County of Rings, with intent to cause the death of FARRS BOGIN, attempted to cause the death of HARRY POGIN by means of a deadly weapon, to wit: a loaded machine-gun, the exact nature of which is unknown to the Grand Jury, there'ry inflicting divers wounds and injuries upon the said BARRY BOGIN.

SECOND COUNT

THE GRAND JURY OF THE COURTY OF KINGS. by this indictment, accuse the defendant of the grise of ASSAULT IN THE FIRST DEGREE, committed as follows:

The defendant, being aided by another person actually present, on or about March 11, 1971, in the County of Kings, with intent to cause serious physical injury to HARRY BOOTH caused such injury to HARRY BOOTH by means of a deadly weapon, to rit: a loaded machino-gun, the exact nature of which is unknown to the Grand Jury.

THE GRAID JURY OF THE COUNTY OF KINGS, by this indictment, access the defendant of the crime of Possession OF WEAPONS AND RANGEMOUS INSTRUMENTS AND APPLIANCES, AS A PELONY, committed as follows:

the defendant, being aided by another person actually present, on or about March 11, 1971, in the County of Kings, unlawfully had in his passession a mechine-gum or other firearm or weapon simulating a mechine-gum and which is adaptable to such use.

DISTRICT ATTORNEY

1

SUPREME COURT OF THE STATE

Tried-Part.

A.D.A.

.

EXHIBIT B

(ODRER ON APPEAL FROM JUDMENT OF CONVICTION)

4

HON.-SAMUSIS BADIN, Amilia de la HON.-SAMUSIS DE HOPEINEHON.-SAMUSIS DE HOPEINEHON.-PEED-S:-MUNDER
HON. M. HENRY MARTUSCELLO
HON. HENRY J. LATHAM
BON.-S.-FEWIN-SERPINGHON. FRANK A. GULOTTA
HON. MARCUS G. CHRIST
TION:-ASTEUD-D-SRENNANHON. A. DAVID BENJAMIN

Acting Presiding Justice

The People of the State of New York.

Respondent,

Order on Appeal from Judgment of Conviction

Joseph Tremarco,

٩.

:

Appellant

In the above entitled action, the above named Joseph Tremarco,

defendant in this action, having appealed to this court from a judgment of the Supreme

Court, Kings County, rendered December 17, 1971;

and the said appeal having been argued

by Michael J. Gillen,

Faq., of counsel for the appellant, and

by Helman R. Brook

, Eaq.

of counsel for the respondent, and due deliberation having been had thereon; and upon this court's

decision alip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby

unanimously affirmed.

Enter:

Clark withe Appellate Division

EXHIBIT C

CERTIFCATE

State of New York Court of Appeals

BEFORE: HON. JOHN F. SCILEPPI, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH TREMARCO.

DENYING LEAVE

Appellant.

I, JOHN F. SCILEPPI, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated Kew Gardens, New York
June 29, 19 72

Associate Judge

^{*}Description of Order: Appellate Division, Second Department, order.

EXHIBIT D

LETTER DATED DECEMBER 4, 1972

FROM CLERK OF THE SUPREME COURT OF THE UNITED STATES

TO RAYMOND B. GRUNEWALD, ESQ.

OFFICE OF THE CLERK WASHINGTON, D. C. 20543

Raymond Bernhard Grunewald, Esq. Grunewald, Turk & Gillen 16 Court St. Brooklyn, N. Y. 11241

DEC 4 1972

RE: TREMARCO V. NEW YORK,

Dear Sir:

4 4 min

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Very truly yours,

MICHAEL RODAK, JR., Clerk By

Helen Taylor, (Mrs.) Assistant Clerk

District Attorney, kings County 400 Municipal Bldg.
Brooklyn, N. Y. 11201

EXHIBIT E
(ORDER OF DISMISSAL)

Lie lio. 711863

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MEW YORK

UNITED STATES OF AMERICA

ORDER OF DISMISSAL

-against-

Docket No. 71 M 1105

JOSEPH TREMARCO,

Defendant.

The United States Attorney having moved to dismiss the complaint herein as to defendant(/) JOSEPH TREMARCO, and said motion having

been granted, it is

hereby dismissed as to defendent(\$) JOSEPH TREMARCO.

Dated: Brooklyn, New York

October 4, 1971.

UNITED STATES PAGISTRATE.

CRIMINAL CALENDAR

11465

JUDGE U. S. Magistrate HON. Max Schiffman

DATE October 4, 1971

	3		
1. A .X.	Defendant		Assistant in Charge
OR BISMISSAL	OF COMPLAINT	1	
711863	Joseph TREMARCO (Arre	m-3-12-71)	BOYD
			A service of the serv
2	rate of the second		
	Complaint diamin	ind and (Co	Teber 4. 1971
the property	Chair of Summer	al Dullan	, sat
			Sar Par State of the State of t
11111	3 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1	*	19 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1
			* · · · · · · · · · · · · · · · · · · ·
William .			
1986			Control of the second
113	· · · · · · · · · · · · · · · · · · ·		
eller .		Y	
egran a			the state of the s
	- 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1		The state of the s
	f 1	* * * * * * * * * * * * * * * * * * *	Carry Land Com
r r		4 3 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4	
110-11	4 3 5 3	***	
i kai	1 4 4 1 4 1 4 1 4 1 4 1 4 1 4 1 4 1 4 1		A CONTRACTOR OF THE STATE OF TH
		1 4.75	a de la companya della companya della companya de la companya della companya dell
<u> </u>		4 1 1	
F. 35 40	Compared to the second	The strain of the	
7.10	1	3	CHANGE TO SERVICE TO THE TOTAL PROPERTY.



ORDER TO SHOW CAUSE

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK I CONSTANTING

JOSEPH TREMARCO.

Petitimez 73C

317

-against-

ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK, DISTRICT ATTORNEY FOR KINGS COUNTY, STATE OF NEW YORK, POLICE DEPARTMENT OF THE CITY OF NEW YORK, STATE OF NEW YORK, PEDERAL BUREAU OF INVESTIGATION, and WARDEN, GREENHAVEN CORRECTIONAL FACILITY, STORMVILLE, NEW YORK

ORDER TO SHOW

Respondents.

Upon the verified petition, and exhibits referred to and attached, of JOSEPH TREMARCO for issuance of a writ of habeas corpus, it is

ORDERED, that the respondents, ATTORNEYS GENERAL OF THE UNITED STATES, UNITED STATES ATTORNEY FOR THE BASTERN DISTRICT OF NEW YORK, DISTRICT ATTORNEY FOR KINGS COUNTY, STATE OF NEW YORK, POLICE DEPARTMENT OF THE CITY OF NEW YORK, STATE OF NEW YORK, FEDERAL BURBAU OF INVESTIGATION, and WARDEN, GREENHAVEN CORRECTIONAL FACILITY, STORMVILLE, NEW YORK, show cause before this Court at the United States Courthouse, 225 Cadwan Plaza East, Borough of Brooklyn, on the 22 day of A PACH , 1973, why a writ of habeas corpus should not issue herein as prayed for in the petition dated January 31, 1973 attached hereto, and it is further

ORDERED, that the service of this order to show cause, eithern personally or by registered mail return receipt requested, together with a copy of the verified petition dated January 31, 1973 and exhibits attached herein, on respondents, on or before

MMDCH \$3 1973, at 5 a'clock p.m., be deemed .
sufficient service.

Dated: MACH. 7 , 1973

MARK ACONSTANTINU
United States District Judge

MEMORANDUM AND ORDER DATED MAY 24, 1973

Joseph Tremmer
Draw B
27a
Stormviele by 18780

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

JOSEPH TREMARCO

vs.

ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK, DISTRICT ATTORNEY FOR KINGS COUNTY, STATE OF NEW YORK, POLICE DEPARTMENT OF THE CITY OF NEW YORK, STATE OF NEW YORK, FEDERAL BUREAU OF INVESTIGATION, and WARDEN, GREENHAVEN CORRECTIONAL FACILITY, STORMVILLE, NEW YORK

73-C-317

: MEMORANDUM and ORDER

. MAY 24 1973

Hon. Robert A. Morse, U.S. Attorney, E.D.N.Y., by Harold J. Friedman, Esq., Ass't U.S. Attorney, for federal respondents

Hon. Louis J. Lefkowitz, Attorney General of the State of New York, by Hillel Hoffman, Esq., Ass't Attorney General, for respondent Superintendent of Greenhaven Correctional Facility

Hon. Eugene Gold, District Attorney, Kings County, by Helman R. Brook, Esq. and Richard C. Laskey, Esq., Ass't District Attorneys, for respondent, The People of the State of New York

Grunewald, Turk & Gillen, Esqs., by Michael J. Gillen, Esq., for petitioner

COSTANTINO, D.J.

Petitioner, Joseph Tremarco, presently incarcerated in the Greenhaven Correctional Facility, Stormville, New

York, upon a conviction, after a jury trial, of the crimes of attempted murder, assault in the first degree and possession of weapons and dangerous instruments and appliances, seeks his release through federal habeas corpus. He was sentenced in the Supreme Court, Kings County to a maximum sentence of 25 years imprisonment. The conviction was affirmed by the Appellate Division, Second Department, without opinion, on May 30, 1972. The New York Court of Appeals has denied leave to appeal, and the United States Supreme Court has denied a writ of certiorari.

Petitioner claims that his conviction should be set aside because (1) it was error to deny defense requests for the statements of Harry Bogin, the principal government witness, made to an F.B.I. agent shortly after the alleged crime was committed and the statements of Special Agent Gerald Collins, Federal Bureau of Investigation, New York Division, another key government witness; (2) the in-court identification of petitioner was fatally infected by a prior illegal photo identification and showup; (3) the District Attorney's summation was inflammatory and highly prejudicial; (4) the District Attorney committed error by calling an F.B.I. employee as a witness and (5) as a matter

of law the evidence against petitioner was insufficient.

Prior to the trial petitioner was afforded a <u>Wade</u> hearing.

The testimony adduced at the hearing and trial may be summarized as follows.

On March 11, 1971 at about 7:00 a.m. Harry Bogin was shot in front of his home. Bogin testified that he saw a man with a machine gun, that he saw a full view of his assailant's face and that he immediately recognized the man to be Joseph Tremarco, a person he had seen a few months before in a New Jersey Federal Court. Bogin and Tremarco had appeared as colefendants in a federal criminal case. Bogin testified that during the proceedings in the New Jersey Federal Court he had an opportunity to observe Tremarco in the courtroom and also in a small room where they were fingerprinted and photographed. Testimony was also received that shortly after the shooting Bogin had told his wife that Tremarco had shot him. This story was also told to several other persons who came to Bogin's aid.

Shortly after the shooting, in his hospital room,
Bogin was interviewed by Special Agent Collins. He was
shown a series of 48 photographs, one of which he identified

as Joseph Tremarco, the man who shot him. At this time Tremarco was brought into the room and was identified by Bogin as the man who had shot him.

At the conclusion of the <u>Wade</u> hearing the judge granted defendant's motion to suppress the photo identification and showup. However, he denied defendant's motion to suppress an in-court identification. The court's holding was based upon its finding that Harry Bogin had immediately recognized his assailant having had an independent recollection of who he was. Undoubtedly, the court's finding was supported by the corroborating testimony of those persons who had spoken to Bogin shortly after the shooting and were told that Tremarco was the assailant and by the circumstances of Bogin's earlier acquaintance with Tremarco.

One of the corroborating witnesses who appeared at the hearing was Special Agent Collins. He testified about the photo identification and showup. Of critical importance, however, was his statement that earlier that day Bogin had told him that Joseph Tremarco had shot him. This statement not only corroborated Bogin's testimony but also supported

a finding that Bogin had a means of identifying Tremarco independent from the photo identification and showup. Upon cross examination Collins was asked if he had made any reports in reference to his testimony. Though Agent Collins admitted to making a report he refused to turn it over to defense counsel, alleging that it contained information of other matters. Inquiry was made as to whether the additional matters could be separated from the report, to which Collins replied that it could not. The judge then denied defendant's request for the report.

A similar problem arose with regard to Harry Bogin's testimony. On cross examination Bogin admitted that he had been interviewed by F.B.I. agents and that they had taken notes. The judge, however, denied defendant's requests for the statements.

Initially this court must determine whether the trial court's denial of the requested statements was proper, and, if found to be improper, whether it invalidates the trial. In its consideration of the problem at hand the court is ever mindful of the possible impact the statements may have had upon the proceedings. The crux of the trial

court's ruling permitting the in-court identification was its finding that Bogin had a prior and independent source for identifying the petitioner. This decision was in large part bottomed upon the uncontroverted testimony of Bogin and other corroborating witnesses. It cannot be denied that if it were shown that shortly after the shooting Bogin had told an F.E.I. agent a different story, had identified another person or had given a contradictory description of his assailant, this evidence would have served to impeach his positive identification and would have seriously undermined the trial court's ruling.

That the materiality of the prior statements of any witness testifying against a defendant in a criminal case should not be left to mere speculation or conjecture is also indisputable. Under New York law a defendant has a right to examine a witness' prior statements so long as they relate to the subject matter of the witness' testimony.

People v. Rosario, 9 N.Y. 2d 286, 213 N.Y.S.2d 448 (1961).

The right of inspection exists whether the witness is testifying upon a trial or at a hearing. People v. Malinsky.

15 N.Y.2d 86, 262 N.Y.S.2d 65 (1965). In Malinsky the New York Court of Appeals reasoned:

In either event, a right sense of justice entitles the defense to ascertain what the witness said about the subject under consideration on an earlier occasion. Id. at 90, N.Y.S.2d 70.

Similarly, the United States Supreme Court in exercising its power

to prescribe procedures for the administration of justice in the federal courts decided that the defense in a federal criminal prosecution was entitled, under certain circumstances, to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses. Palermo v. United States, 360 U.S. 343, 345 (1959).

See <u>Jencks v. United States</u>, 353 U.S. 657 (1957); <u>cf</u>.

18 U.S.C. 3500 (1971). A major premise of the holding in the <u>Jencks</u> case was that the government has an obligation to insure that justice is done, and that it is unconscionable to allow the government once it has undertaken to prosecute an individual, to deprive that individual of anything which might might be material to his defense. <u>Jencks v. United</u>

States, <u>supra</u> at 671; see <u>United States v. Reynolds</u>, 345 U.S.

1 (1953).

Utilizing the same rationale the Supreme Court in the case of Brady v. Maryland, 373 U.S. 83 (1963), held that

the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Id. at 87.

Clearly the purview of <u>Brady</u> and <u>Jencks</u> would encompass evidence which would serve to impeach in any way the positive identification of the petitioner by Harry Bogin. <u>Moore v. Illinois</u>, 408 U.S. 785 (1972).

Analysis of both federal and New York law discloses that a defendant in a criminal case has a right to examine the statements of witnesses who testify against him. A violation of that right should properly give rise to a presumption, in the absence of clear proof to the contrary, that the defendant was prejudiced and should be viewed as a violation of due process. Killian v. United States, 368

U.S. 231 (1961); Rosenberg v. United States, 360 U.S. 367 (1959); United States v. Missler, 414 F.2d 1293 (4th Cir. 1969).

In his brief the Attorney General of the State of
New York argues that the state prosecutor had no duty of
disclosure with regard to the statements of either Bogin
or Special Agent Collins. It is claimed that since the
F.B.I. refused to make those statements available, the New
York prosecutor, having no jurisdiction over the matter, was
exonerated from any duty of disclosure. Indeed the record
reflects that the Federal Government refused to turn over
the requested statements to the defense.

A question arises, then, as to the propriety of the Federal Government's refusal to make the statements available. For, notwithstanding that the state prosecutor did not have custody of the statements, if it is found that their denial was improper, and that the statements were material to the defense, the court would be compelled to conclude that the petitioner had not been given a fair trial and that his right to due process had been violated. Moore v. Illinois, supra.

Undoubtedly if the state prosecutor had custody of the statements or if Tremarco had been tried in a federal court, the statements would have been turned over to the defense. That the statements included matters which were unrelated to the testimony of the witnesses would not have prevented the defense counsel from obtaining those statements which were related to the testimony given. In such a situation the courts have the power to order that the extraneous matters be redacted or that the statements be submitted for an in camera inspection whereby the judge would determine what matters should be made available to the defendant.

In his brief the United States Attorney for the

Eastern District of New York argues that the United States

Government has the right to deny access to the statements
in question pursuant to the authority granted to the

United States Attorney General by the Freedom of Information

Act, 5 U.S.C. § 552(b)(1971). In support of his argument
he cites United States ex rel. Touhy v. Ragen, 340 U.S. 462

(1951) and Frankel v. S.E.C., 460 F.2d 813 (2d Cir. 1972).

Neither the Freedom of Information Act nor the two cases

cited support the United States Attorney's position.

In Touhy, the Supreme Court's consideration was limited to the situation whereby a habeas corpus petitioner, in an attempt to prove his innocence, issued a subpoena duces tecum against an F.B.I. agent requiring the production of certain F.B.I. records. The trial court sought to enforce the subpoena and ordered that the records be produced. The Supreme Court ruled that the Attorney General had the power to refuse to comply with the broad ambit of the subpoena. However, the Court specifically noted that its holding would not apply to a situation where a judge orders the material submitted to him for an in camera inspection or to a situation where the government has waived its privilege. Indeed the restrictions prescribed by the Freedom of Information Act have no bearing on the limited disclosure rights of a defendant in a criminal case. This is especially true where the government waives its privilege of secrecy by voluntarily disclosing the matters contained in its files. In such an instance, where the government's disclosure comes in the form of testimony against a defendant in a criminal trial, whether it be in a federal or state court, the defendant should be allowed to examine any statements in the custody of the Federal Government to

the extent that such statements relate to the matters voluntarily disclosed. By limiting the defendant's right of disclosure to include only that which is voluntarily proffered against him, a proper balance will be obtained between the defendant's due process right to a fair trial and the Federal Government's right to protect the secrecy of its investigatory files.

The record of this case discloses that at all times throughout the proceedings the defense counsel's request for statements has been limited to only those which relate to the testimony of the witnesses appearing against his client. Accordingly, when Agent Collins was allowed to testify about his conversations with Bogin the Federal Government waived any privilege it may have had with regard to the information divulged. Consequently, the government's refusal to make the statements available was improper.

Having determined that the statements were illegally denied the court is still faced with the question of their materiality. Unfortunately, the Federal Government continues in its steadfast refusal to make the statements available. In view of the court's finding that the United

States has waived its privilege of secrecy with regard to the requested statements, the court orders the United States Attorney for the Eastern District of New York, the present custodian of the statements, to turn them over to petitioner's counsel, Michael J. Gillen, Esq. The court will reserve final decision on this proceeding pending examination of those statements and the completion of any other proceedings which may be required. Should a problem arise as to the extraction of extraneous material from the reports the United States Attorney should proffer the reports to the court for an in camera inspection.

The United States Attorney argues in his brief that the United States is not a proper party in this proceeding. The court, however, takes the view that since it has primary jurisdiction to issue the writ and since the United States is the custodian of the statements in question, which are of crucial importance, fairness and justice mandate that the United States be a party to this proceeding. 28 U.S.C. § 1651(a)(1971).

U. S. D. J.



LETTER OF JUNE 1, 1973 WITH ENCLOSURE

JDP:HF:dml P.# UNITED STATES ATTORNEY

EASTERN DISTRICT OF NEW YORK FEDERAL BUILDING BROOKLYN, N. Y. 11201

June 1, 1973

40a

Michael Gillen, Esq. Grunewald, Turk & Gillen 16 Court Street Brooklyn, New York

Re: Joseph Tremarco v. Attorney General of the United States et al.
Civil Action No. 73 C 317

Dear Mr. Gillen:

Pursuant to the Court's order of May 24, 1973 in the above captioned matter, we are furnishing you with that portion of F.B.I. Agent Collins 302 report consisting of six pages, concerning Mr. Bogin's conversations with him regarding the identification of Mr. Tremarco as the assailant of Mr. Bogin.

Very truly yours,

ROBERT A. MORSE United States Attorney

Harold Friedman

Assistant U.S. Attorney

cc:

Hon. Mark A. Costantino

Hillel Hoffman Assistant Attorney General - State of New York

Helman R. Brook
Assistant District Attorney - Kings County

C

FEDERAL BUREAU OF INVESTIGATION

Date	3/17/71	1
	The second name of the second	

The following investigation was conducted in the recovery room of the Coney Island Hospital. Having obtained the permission of Doctor MARCHAL M. CHRRUTH, Chief Surgeon, HARRY BOGIN was interviewed. Assistant District Attorney THOMAS DAVENPORT was present during the interview.

HARRY BOGIN furnished the following information:

BOGIN having been asked the question who shot him, stated, "JOSEPH TREMARCO". BOGIN further stated that as he was preparing to leave for work in the early morning hours, he discovered that a tire was flat on his truck. As he prepared to fix it he noticed JOSEPH TREMARCO step from a dark automobile with what appeared to be a submachine gun. BOGIN advised that he began to run and then was shot down. BOGIN stated that there were two other white males in the car but stated he did not recognize them. BOGIN further advised that he did not have a gun.

C

On 3/11/71 of Brooklyn, New York Files NY 15-57830

by SA W. PHILLIP SANDIDGE/1: _______ Dute dictated ______ 3/17/71

This document contains neither recommendations nor conclusions of the Bi. It is the property of the FBI and is loaded to your agency; it and its contents are not to be distributed outside your agency.

FEDERAL BUREAU OF INVESTIGATION

	3/16/71	
Date	3/10/11	

HARRY E. BOGIN was interviewed at the Coney Island Hospital, Brooklyn, New York, and the following information was obtained.

He stated that at approximately 7 o'clock on the morning of March 11, 1971, he walked out of the front door of his apartment building which was located on 2783 Brighton 8th Street, Brooklyn, New York. He stated that upon stepping out of the building he noticed that the left front tire of his truck which was owned by the J & T Delivery Company, New York, New York, was flat. He stated that the truck was parked immeddately across the street. BOGIN then walked across the street to the vehicle and was about to proceed with the changing of the flat tire, when he noticed a black sedan in close proximity. He stated he observed an individual whom he recognized step out of the sedan and hold what appeared to BOGIN to be a Thompson Submachine Gun. BOGIN immediately ran from his truck and attempted to run between his apartment building and a adjacent building. As BOGIN ran through the driveway between the two buildings he was struck down by a volley of shots from the submachine gun. The car sped away after which BOGIN was able to limp to the doorstep of his apartment and crawled up the stairs to his apartment. There he collasped on the kitchen floor in the presence of his wife. He instructed her to call an ambulance because he had been shot. Shortly thereafter, MARK STEINBERG, a neighbor who resided directly across the street from the BOGIN residence arrived and attempted to comfort BOGIN.

who had shot him and had identified the individual as being JOSEPH TREMARCO, who is identical with an individual who had been indicted with EOGIN by a Federal Grand Jury in Newark several months previously. BOGIN stated that he was positive that the individual who had shot him was TREMARCO

On3/12/71ot	Brooklyn, New Yo	rkFII++	15-57830	
by SA GERALD M. COL	LINS / pc	Date dictated	3/16/71	

?

MY 15-57830

and that the weapon used was a submachine gun. He further stated that two other individuals were also in the car at the time of the shooting.

BOGIN stated that the attempt on his life would not in any way deter him from further cooperating with Agents of the Federal Bureau of Investigation (FBI).

BOGIN stated however that he was surprised that the attempt on his life had been carried out by TREMARCO because BOGIN had never been acquainted with TREMARCO until he had observed TREMARCO at the Fedeal Court in Newark several months ago.

1

ALL STATE OF THE PARTY OF THE PARTY.

FEDERAL BUREAU OF INVESTIGATION

Date____3/16/71

HARRY E. BOGIN, 2783 Brighton 8th Street, Brooklyn, New York, was interviewed at the Coney Island Hospital, Brooklyn, New York, and the following information was obtained.

BOGIN was permitted to view photographs of the following individuals:

HICHAEL HEDICO

ALMANDO PANDO ANTHONY NOLAN SID ROSNER LOUIS FELICE JOHN KOMPLITA CHARLES LUCIANO HENRY SERRAPICA FRANK BALTERA SIDNEY CULTER ROBERT LEE JOSEPH FULCO FRANK KNOWL ROBERT GARRITY DANIEL DELLISANTE JAMES FRESCO, JR. JAMES BENEDETTO ANGELO ALBANISE JOSEPH BOFFA, JR. RAYMOND ROTONDI CARMINE BATTISTA JOSEPH TREMARCO ARTHUR DOME HERB SEVERLOUGH JERRY BARILLA R. VILHOTTI RUBIN GIMELSTOB JAMES GIORDANO

On3/12/71ot	Brooklyn, New York	_File #]	15-57830
SA CERALD M. COLLINS			
by SA JAMES F. AHDARN:	GMC/pc	_Date dictated	3/16/71

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

2

NY 15-57830

JOSEPH FASULO
SALVATORE DE LORENZO
ROBERT CALDWELL
HOWIE DUBIN
DOMINICK TREMARCO
HUGO COLASANTI
MYRON LIEBERMANN TO BE TO SERVE DOMINICK CATALDO

FORREST CERRY
DOMINICK CATALDO
FRED PALLUZZI
WILLIAM NEMIS
WILLIAM CAPPARELLI
ARTHUR HC CARTHY
DANTE BOCCACCIO
SHELDON BLOOM
ALPHONSE POLICASTO
PATRICK KING
RICHARD MICLIZ
HERBERT GIMELSTOB

After having viewed the above photographs, POGIN stated that he positively identified the photograph of JOSEPH TREMARCO as having been the same individual who on the morning of March 11, 1571, shot BOGIN down in the front of BOGIN's residence with a submachine gun.

Also present during the above identification were Detective EALPH DE SANTI, South Brooklyn Homicide Squad, Brooklyn, New York, and Assistant District Attorney THOMAS DAVEMPORT, Erooklyn, New York.

1

FEDERAL BUREAU OF INVESTIGATION

Date	3/	16/	17	1
DG16	-	/	•	-

HARRY E. BOGIN, 2783 Brighton 8th Street, Brooklyn, New York, was interviewed at the Coney Island Hospital, Brooklyn, New York, and the following information was obtained.

BOGIN was permitted to view the person of JOSEPH TREMARCO and upon viewing TREMARCO he stated positively that TREMARCO was the individual who assaulted him with a submachine gun on the morning of March 11, 1971, in front of the BOGIN residence located at 2783 Brighton 8th Street, Brooklyn, New York.

on 3/12/71 of Brooklyn, New York	FII++15-57830	
SA GERALD M. COLLINS		-
SA JAMES F. AHEARN: GMC/ pc	Date dictated 3/16/71	

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

LETTER DATED SEPTEMBER 26, 1973

GRUNEWALD, TURK & GILLEN

ATTORNEYS AT LAW 16 COURT STREET BROOKLYN, NEW YORK 11241

RAYMOND BERNHARD GRUNEWALD NORMAN TURK . MICHAEL J. GILLEN

(212) 658-6484 (212) 624-3584

September 26, 1973

Hon. Mark A. Costantino United States District Judge Eastern District of New York 225 Cadman Plaza East Brooklyn, New York 11201

Re: Joseph Tremarco vs. Attorney General of the United States, et. al. 73 C 317

Dear Judge Costantino:

The undersigned is in receipt of Memorandum and Order filed by this Honorable Court on May 24, 1973.

Since the date of the Order, the United States Attorney's Office has turned over certain documents which purport to be the reports of the F.B.I., in connection with statements taken from Mr. Harry Bogin, copies of which are enclosed.

It is respectfully submitted that comparison of the statements furnished pursuant to the Court's Order and the trial testimony of Harry Bogin, mandate setting aside the conviction herein and the ordering of a new trial for the reasons set forth.

At page 17-18 of the Wade hearing, the 302 reports of the F.B.I. that were sought, were specifically restricted to the identification proceedings and procedures of Tremarco's removal from Newark to Brooklyn. No other matter was sought.

"MR. GILLEN: Your Honor, as to the subpoena served on September 8, 1971, upon the Federal Bureau of Investigation wherein I called for any and all records filed, documents pertaining to the arrest of Joseph Tremarco on or about March 11th or 12th, 1971, I want to make clear, Your Honor, what that subpoena intended

was any and all records pertaining to any identification procedures had either on the 11th of March or the 12th of March, 1971, as well as any procedures followed by the Federal Bureau of Investigation to effect Mr. Tremarco's removal from Newark, New Jersey to New York.

THE COURT: You are dealing with two things; one with respect to identification and one with respect to bringing them in, whether there was confusion between the authorities.

MR. GILLEN: Your Honor, I respectfully submit they're both part and parcel of the one thing. you really can't separate them in the context of the facts in this case; that everything that was done, my position is, was done with the end result, was to have an illegal show-up. I really don't separate them into two things. I maintain this is part and parcel, one and the same thing. I'm not showing for all the records of the F.B.I. or all the investigation or any information Mr. Bogin might have given him in any other case.

THE COURT: Mr. Rosenthal, is the United States Attorney's office prepared in any manner to produce any of the material called for in the subpoenaes?

MR. ROSENTHAL: My understanding is, Your Honor, a request was sent to Washington and the Bureau in Washington directed the local office of the F.B.I. not to release any information in its files at this time.

THE COURT: That includes the limited information sought by Mr. Gillen with respect to the identification procedures, is that correct? Is that the position you stand on today?

- 3 -

MR. ROSENTHAL: That is the information.

THE COURT: In support of that, you have submitted to me the regulations and you stand on that?

MR. ROSENTHAL: That's correct.

At page 68 of the hearing Harry Bogin testified as follows:

- Q Did you have any conversations with any agents of the Federal Bureau of Investigation relating to this case, Mr. Bogin?
- A Yes, I did.
- Q And did they take notes?
- A To my knowledge, they probably did.

MR. GILLEN: I call upon the district attorney to use his good offices with the Federal Government and to produce any statements and any recordings made of statements by any Federal agent of Mr. Bogin.

MR. DAVENPORT: I can step outside and ask Agent Collins, who is standing outside, if he has any memorandum.

THE COURT: Very well.

MR. GILLEN: Not only if he has it, if there are any in the FBI files.

MR. DAVENPORT: I can ask Collins.

At pages 172-174 of Hearing Record Special Agent Collins testified:

Q Mr. Collins, have you made any reports in reference to your testimony that you gave here today?

- A Yes, sir.
- Q And are those reports called 302-H reports?
- A 302 are contained in the reports. However, the testimony I have given you are contained in some FBI reports.

MR. GILLEN: I respectfully demand this report.

THE COURT: Is it related to this incident?

MR. GILLEN: Yes, sir.

THE COURT: Do you have them?

THE WITNESS: No, sir, I do not have them.

THE COURT: Are they available?

THE WITNESS: No, sir, they are not. These reports encompass several other federal violations, very serious, in which the defendant is also under investigation for, and it is for this reason, to my knowledge --

THE COURT: Can the information being sought in this proceeding be divulged without taking off the other matter?

THE WITNESS: I say no, sir, that there is information contained on these 302's which are pertinent to other matters in which we could not give them, however, I would be glad to testify as to the specific offenses that is here, sir.

THE COURT: All right.

MR. GILLEN: I respectfully except, your Honor.

meis

THE COURT: Well, if it could be readily accessible and split up without divulging the other information, I would order him to produce it. If he tells me it is part and parcel of other investigations, I will not do so.

- 5 -

MR. GILLEN: I respectfully except. I suggest it curtails my cross-examination. I respectfully object to it under the 14th Amendment of the Constitution of due process.

At page 223 of the Hearing Record, Special Agent Collins further testified:

- Q And did Mr. Bogin tell you that he told Mr. Steinberg that Mr. Tremarco had shot him?
- A Right.

M

- Q Is that in your report?
- A. To my recollection it is.

MR. GILLEN: I ask for that report, Your Honor.

THE COURT: Is that a separate report?

THE WITNESS: No Sir. Your Honor, the report (p 224) encompasses, as I stated before, several Federal violations in which Mr. Tremarco is currently under investigation by our office.

THE COURT: And you have been ordered not to produce them?

INST)

THE WITNESS: Yes, because it is one complete report involving several Federal violations, including obstruction of justice.

THE COURT: And you wouldn't produce that to any authority, including the judge; is that correct?

THE WITNESS: That's correct. That's my instructions.

In Special Agent Collins' 302 report of an interview with Harry Bogin on 3/12/71 Bogin stated:

"...He observed an individual whom he recognized step out of the sedan and hold what appeared to Bogin to be a Thompson Submachine Gun. Bogin immediately ran from his truck and attempted to run between his apartment building and an adjacent building. As Bogin ran through the driveway between the two buildings he was struck down by a volley of shots from the submachine gun. The car sped away after which Bogin was able to limp to the doorstep of his apartment and crawled up the stairs to his apartment.

In a 302 report of Special Agent Sandidge of the F.B.I. concerning an interview of Harry Bogin on 3/11/71 appears:

HARRY BOGIN furnished the following information:

BOGIN having been asked the question who shot him, stated, "JOSEPH TREMARCO". BOGIN further stated that as he was preparing to leave for work in the early morning hours, he discovered that a tire was flat on his truck. As he prepared to fix it he noticed JOSEPH TREMARCO step from a dark automobile with what appeared to be a submachine gun. BOGIN advised that he began to run and then was shot down. BOGIN stated that there were two other white males in the car but stated he did not recognize them. BOGIN further advised that he did not have a gun.

Mr. Bogin testified at Trial (page 52 Trial Record):

- Q Well, did you recognize him as he was coming up sideways, Mr. Bogin?
- A I don't know if I fully recognized him sideways. I know I got a full face view of him.
- Q And then what happened after you said. "No"?
- A Well, the next thing I can really remember is I started to run back across the street from the back of my truck, and I was hit several times, fell down, and when I hit the other sidewalk,

a few seconds afterwards, I heard a car starting to pull away peeling rubber, and I had glanced in that direction, and at that time I got up and ran upstairs into my house.

It is apparent that at trial Mr. Bogin testified he was shot in the street and reached the opposite sidewalk whereas his statement to Agent Collins was he ran between his apartment building and an adjacent building. The prior statements of Mr. Bogin would have been of incalculable value at trial in cross-examination and would have insured an acquittal.

It is respectfully submitted that the government's position and the testimony of Agent Collins at the hearing that the prior statements affected other matters was, at best deceptive and at worst calculated to deny Mr. Tremarco a fair trial. The statements speak for themselves. No interest of the government was served by withholding them.

If the government has complied with this Honorable Court's ruling to turn over these statements to counsel, it is apparent that sworn testimony before a Judge of the New York State Supreme Court was untrue. If the government has other statements in its possession, then it is a travesty of justice.

This Court should set aside the conviction of Mr. Tremarco and order a new trial or in the alternative, order a full hearing to bring all the facts in this case to the searching light of a Court of Law.

In the Court's preliminary rulings, on the petitioner's motion, no decision was made to set aside his conviction on the grounds that a tainted in court identification was permitted in evidence; that the inflammatory remarks by the prosecutor in his summation were without a basis in the trial record and denied the petitioner a fair trial; that the prosecutor, in calling an F.B.I. employee as a witness without any proper reason, and without any relevancy to the issues, prejudiced the jury and denied petitioner a fair trial;

and that as a matter of law, the evidence was insufficient to sustain the verdict of guilty, based upon proof beyond reasonable doubt; that a hearing be ordered where all respondents, including the New York City Police Department be required to be present and to produce all their records, statements of witnesses, reports of investigations, and all facts and exhibits in their possession, or under their control, pertaining to this case. (The files of the New York City Police Department would be particularly pertinent as in one of Mr. Bogin's statements, he denies that he had a gun). It is respectfully submitted that the very denial of him having been in possession of a gun is a basis for believing that there was some evidence that another gun was present at the scene and that Mr. Bogin possessed it. This would be reflected in New York City Police Department files or in the files of the F.B.I.

Sincerely yours,

Michael J. Gillen

MJG/eb

CC to:

United States Attorney Eastern District of New York 225 Cadman Plaza East Brooklyn, New York 11201

Donald F. Cawley Police Commissioner City of New York 240 Centre Street New York, New York

Hon. Eugene Gold
District Attorney
Kings County
Municipal Building
Brooklyn, New York

Hon. Louis J. Lefkowitz Attorney General of the State of New York 2 World Trade Center New York, New York NOTICE OF MOTION DATED AUGUST 20, 1974 FOR A NEW TRIAL OR A FULL HEARING

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK JOSEPH TREMARCO,

Petitioner,

-against-

73C 317

ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK, DISTRICT ATTORNEY FOR KINGS COUNTY, STATE OF NEW YORK, POLICE DEPARTMENT OF THE CITY OF NEW YORK, STATE OF NEW YORK, FEDERAL BUREAU OF INVESTIGATION, and WARDEN, GREENHAVEN CORRECTIONAL FACILITY, STORMVILLE, NEW YORK,

Respondents.

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavit of MICHAEL J. GILLEN, ESO., duly sworn to the day of August, 1974, and upon all of the prior proceedings had herein including the petition for writ of habeas corpus filed before this Monorable Court, the undersigned will move this Court before the Mon. Mark A. Costantino, United States District Judge, Eastern District of New York, on the F day of Aptricut, 1974, in the United States Courthouse at 225 Cadsan Plaza East, Porough of Brooklyn, City and State of New York, at 10 o'clock in the forence of that day or as soon thereafter as Counsel can be heard, for an Order granting JOSEPH TREMARCO, petitioner herein, a new trial or for such other and further relief as to this Court may seem just and proper.

Nie Juir Dated: 2rooklyn, New York

ICHAEL J. GILLEY, ESQ.

GRUNEWALD, TURK & GILLEN Attorneys for Petitioner

) 37 (- ") 16 Court "treet

Brooklyn, New York 1241 Tel.: 858-6464 or 624-3584 LOUIS J. LESKOWITZ
Attorney General of the State of New York
2 Morld Trade Center
New York, New York 10047

DAVID TRAEGER
United States Attorney for Eastern
District or New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

EUGENE GOLD
District Attorney for the County of Kings
Municipal Building
Brooklyn, New York 11201

ADRIAN P. BURKE Corporation Counsel of City of New York Memicipal Pulling New York, New York

MICHAEL CODD

Commissioner of Police Dept. of lity of N.Y.
1 Police Plaza

New York, New York

WARDEN Canenhaven Correctional Facility Storoville, New York AFFIDAVIT OF MICHAEL J. GILLEN
IN SUPPORT OF MOTION FOR A NEW TRIAL

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JOSEPH TREMARCO,

Petitioner.

-against-

73C 317

ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK, DISTRICT ATTORNEY FOR KINGS COUNTY, STATE OF NEW YORK, POLICE DEPARTMENT OF THE CITY OF NEW YORK, STATE OF NEW YORK, FEDERAL BUREAU OF INVESTIGATION, and WARDEN, GREENHAVEN CORRECTIONAL FACILITY, STORMVILLE, NEW YORK,

----X

Respondents.

STATE OF NEW YORK)
COUNTY OF KINGS) SS.:

MICHAEL J. GILLEY, being duly sworn, deposes and says:
He is the attorney for the petitioner, JOSEPH TREMARCO.

Previously berets, positions and says:

Previously hereto, petitioner moved this Honorable Court for a writ of habeas corpus (730 317) for relief in connection with his conviction before the ion. John A. Monteleone, Justice of the Supreme Court, County of Kings, State of New York.

On Nay 24, 1973, by memorandum and order, this Court granted petitioner partial relief by ordering the United States Attorney's Office of the Bastern District of New York to turn over to petitioner certain documents purporting to be reports of the Federal Bureau of Investigation in connection with statements taken from a Harry Bogin, copies of which are annexed hereto as Exhibit I.

It is respectfully submitted that comparison of the statements furnished pursuant to the Court's Order and the first testimony of Harry Bogin, mandate setting aside the conviction herein and the ordering of a new trial for the reasons set forth.

At page 17-18 of the Wade hearing, the 302 reports of the

P.B.I. that were sought, were specifically restricted to the identification proceedings and procedures of Tremarco's removal from Newark to Brooklyn. No other matter was sought.

"MR. GILLEN: Your Honor, as to the subpoena served on September 8, 1971, upon the Federal Bureau of Investigation wherein I called for any and all records filed, documents pertaining to the arrest of Joseph Tremarco on or about March 11th or 12th, 1971, I want to make clear, Your Honor, what that subpoena intended was any and all records pertaining to any identification procedures had either on the 11th of March or the 12th of March, 1971, as well as any procedures followed by the Federal Bureau of Investigation to effect Mr. Tremarco's removal from Newark, New Jersey to New York.

THE COURT: You are dealing with two things; one with respect to identification and one with respect to bringing them in, whether there was confusion between the authorities.

MR. GILLEN: Your Honor, I respectfully submit they're both part and parcel of the one thing. you really can't separate them in the context of the facts in this case; that everything that was done, my position is, was done with the end result, was to have an illegal show-up. I really don't separate them into two things. I maintain this is part and parcel, one and the same thing. I'm not showing for all the records of the F.3.I. or all the investigation or any information Mr. Bogin might have given him in any other case.

THE COURT: Mr. Rosenthal, is the United States Attorney's office prepared in any manner to produce any of the material called for in the subpoenaes?

MR. ROSENTHAL: My uncerstanding is, Your Honor, a request was sent to Vashington and the Bureau in Washington directed the local office of the F.B.I. not to release any information in its files at this time.

THE COURT: That includes the limited information sought by Mr. Gillen with respect to the identification procedures, is that correct? Is that the position you stand on today?

MR. ROSENTHAL: That is the information.

THE COURT: In support of that, you have submitted to me the regulations and you stand on that?

MR. ROSENTIAL: That's correct.

At page 68 or the hearing Harry Pogin testified as follows:

- Q Did you have any conversations with any agents of the Federal Bureau of Investigation relating to this case, Mr. Bogin?
- A Yes, I did.
- Q And did they take notes?
- A To my knowledge, they probably did.

MR. GILLEN: I call upon the district attorney to use his good offices with the Federal Governand to produce any statements and any recordings made of statements by any Federal agent of Mr. Rogin.

MR. DAVENPORT: I can step outside and ask Agent Collins, who is standing outside, if he has any memorandum.

THE COURT: Very well.

MR. GILLEN: Not only if he has it, if there are any in the PBI files.

MR. DAVENPORT: I can ask Collins.

At pages 172-174 of Hearing Record Special Agent Collins testified:

- Q Mr. Collins, have you made any reports in reference to your testimony that you gave here today?
- A Yes, sir.
- Q And are those reports called 302-H reports?
- A 302 are contained in the reports, However, the testinony I have given you are contained in some FBI reports.

MR. GILLEN: I respectfully demand this report.

THE COURT: Is it related to this incident?

MR. GILLEN: Yes, sir.

THE COURT: Do you have them?

THE WITNESS: No, sir, I do not have them.

THE COURT: Are they available?

THE WITNESS: No, sir, they are not. These reports encompass several other federal violations, very serious, in which the defendant is also under investigation for, and it is for this reason, to my knowledge --

THE COURT: Can the information being sought in this proceeding be divilged without taking off the other matter?

THE WITNESS: I say no, sir, that there is information contained on these 302's which are pertinent to other matters in which we could not give them, however, I would be glad to testify as to the specific offenses that is here, sir.

THE COURT: All right.

MR. GILLEN: I respectfully except, your Honor.

THE COURT: Well, if it could be readily accessible and split up without divulging the other information, I would order him to produce it. If he tells me it is part and parcel of other investigations, I will not do so.

MR. GILLEN: I respectfully except. I suggest it curtails my cross-examination. I respectfully object to it under the 14th Amendment of the Constitution of due process.

At page 223 of the Hearing Record, Special Agent Collins further testified:

Q And did Mr. Dogin tell you that he told Mr. Steinberg that Mr. Tremarco had shot him?

A Right.

Q Is that in your report?

A. To my recollection it is.

MR. GILLEN: I ask for that report, Your Honor.

THE COURT: Is that a separate report?

THE WITNESS: No Sir. Your Honor, the report (p 224) encompasses, as I stated before, several Federal vaolations in which Mr. Tremarco is currently under investigation by our office.

THE COURT: And you have been ordered not to produce them?

THE WITNES: Yes, because it is one complete report involving several Federal violations, i cluding obstruction of justice.

THE COURT: And you wouldn't produce that to any authority, including the judge; is that correct?

THE WITNESS: That's correct. That's my instructions.

In Special Agent Collins' 302 report of an interview with Harry Bogin on 3/12/71 Bogin stated:

"...He observed an individual whom he recognized step out of the sedan and hold what appeared to Bogin to be a Thompson Submachine Gun. Bogin immediately ran from his truck and attempted to run between his apartment building and an adjacent building. As Bogin ran through the driveway between the two buildings he was struck down by a volley of shots from the submachine gun. The car sped away after which Bogin was able to limp to the doorstep or his apartment and crawled up the stairs to his apartment.

In a 302 report of Special Agent Sandidge of the F.B.I. concerning an interview of Harry Bogin on 3/11/71 appears:

HARRY BOGIN furnished the following information:

BOGIN having been asked the question who shot him, stated, "JOSEPH TREMARCO". BOGIN further stated that as he was preparing to leave for work in the early morning hours, he discovered that a tire was flat on his truck. As he prepared to fix it he noticed JOSEPH TREMARCO step from a dark automobile with what appeared to be a submachine gun. BOGIN advised that he began to run and then was shot down. BOGIN stated that there were two other white males in the car but stated he did not recognize them.

- Mr. Sogin testified at Trial (page 52 Trial Record):
 - Q Well, did you recognize him as he was coming up sideways, Mr. Rogin?
 - A I don't know if I fully recognized him sideways. I know I got a full face view of him.
 - Q And then what happened after you said. "No"?
- A Well, the next thing I can really recember is I started to run back across the street from the back of my truck, and I was hit several times, fell down, and when I hit the other sidewalk, a few seconds afterwards, I heard a car starting to pull away peeling rubber, and I

had glanced in that direction, and at that time I got up and ran upstairs into my house.

It is apparent that at trial Mr. Bogin testified he was shot in the street and reached the opposite sidewalk whereas his statement to Agent Collins was he ran between his apartment building and an adjacent building. The prior statements of Mr. Bogin would have been of incalculable value at trial in cross-examination and would have insured an acquittal.

It is respectfully submitted that the government's position and the testimony of Agent Collins at the hearing that the prior statements affected other matters was deceptive and calculated to deny Mr. Tremarco a fair trial. The statements speak for themselves. No interest of the government was served by withholding them.

If the government has complied with this Honorable Court's ruling to turn over these statements to counsel, it is apparent that sworn testimony before a Julge of the New York State supreme Court was untile. If the government has other statements in its possession, then it is a travesty of justice, and the government has perpetrated a fraud on this court.

Judge Monteleone's unequivocal position is contained in his statements at pages 172 to 174 of the pre-trial meaning:

"THE COURT: Well, if it could be readily accessible and split up without divulging the other information, I would order him to produce it. (Suphasis supplied). If he tells me it is part and parcel of other investigations, I will not do so."

Clearly, Judge Montelcome, because of sworn testimony, was led to believe Bogin's statements were inextricably involved with other secret matters and in no way could be redacted. This is just not so. The Court was intentionally misled with the result

of counsel being deprived of the statements of the only witness, which were of critical importance.

If the Court knew the truth, the statments would have been ordered produced and petitioner would not have been denied his constitutional right of effective counsel. As it is, a fraud has been perpetrated on the Court which unequivocally denied petitioner a fair trial in violation of his Fifth, Sixth and Fourteenth Amendements of the United States Constitution.

On April 3, 1974, portions of this matter were argued before this Court, (minutes annexed Exhibit II), wherein Richard Laskey, Assistant District Attorney Kings County, stated at pages 10-11:

"MR. LASKEY: At that time Judge Monteleoni believed he did not have the power to do so, he being a state judge and the F.B.I. agent being a federal agent.

In view of that fact, he refused to turn over the 302 reports on the ground that the State Supreme Court Judge does not have the power to order the F.P.I. to turn it over. The only Court having that power is this Court.

THE COURT: No. Reading 3500, it applies to federal court but if you read it correctly, it is with relation to matters that are discoverable and should be turned over to the other side and I don't think it makes a difference whether the forum is state or federal, anymore than if I try a state matter right now, with state law involved, that doesn't mean I can't interpret that state law just because I'm a federal judge.

MR. LASKEY: Absolutely.

THE COURT: There are limes you must wear two hats and by the same token, if your argument would hold, when you have a constitutional question involved, your answer could not possibly be that the state judge has to say "Wait a minute. This involves the constitution. Go over to Cadman Plaza East because a judge over there will hear those questions."

I'm thinking outloud for the record because I think it is vitally necessary --

MR. LASKEY: I would acree and concede that the Jenks Act and 3500 material would apply to state proceedings and the New York State Court of Appeals in Rosario trys to adopt the Jenks type of discovery procedure for purposes of cross examination of witnesses.

I'm saying that although Judge Monteleoni may have believed that Mr. Gillen was entitled to this material, if the F.B.I. -- if Judge Monteleoni ordered the & B.I. to turn over the material and they refused because they had an order from the Attorney General of the United States saying they shouldn't turn this over to anyone except a federal court judge, then even if Judge Monteleoni wanted to turn it over or examine it in camera, he was powerless to do so.

We know from Judge Monteleone's statement from the bench that he was fully aware of his powers and based his decision, not on a lack of power, but on swern testimony of a government agent which was false.

Mr. Laskey, also conceded (page 11, lines 10-15 of April 3, 1974) "That the Jenks Act and 500 material would apply to state proceedings ... ". Again, without doubt, if true testimony had been adduced and no frauc perjetrated on the Court, this vital material would have been supplied counsel. With this vital material, the verdict could only have been not guilty.

It is respectfully pointed out to this Court that although petitioner's conviction had been appealed to the Appellate Division, the New York State Court of appeals and the United States Supreme Court, no Court has passed on the question raised here for the simple reason petitioner's counsel had been denied the statements until this Henorable Court ordered their production.

In addition, the only other Jidge that could have ordered the production of these statements was grieviously misled to the terrible detriment of petitioner w o is serving twenty-five years imprisonment, a life-time, because of a complete breakdown of candor and honesty on the part of overnment agents. The whole

case reeks of a lynching accomplished by fraud on the Court.

This Court should set aside the conviction of Mr. Tremarco and order a new trial or in the alternative, order a full hearing to bring all the facts in this case to the searching light of a Court of Law.

In the Court's preliminary rulings, on the petitioner's motion, no decision was made to set aside his conviction on the grounds that a tainted in court identification was permitted in evidence; that the inflammatory remarks by the prosecutor in his summation were without a basis in the trial record and denied the petitioner a fair trial; that the prosecutor, in calling an F.B.I. employee as a witness without any proper reason, and without any relevancy to the issues, prejudiced the jury and denied petitioner a fair trial; and that as a matter of law, the evidence was insufficient to sustain the verdict of guilty, based upon proof beyond reasonable doubt; that a hearing be ordered where all respondents, including the New York City Police Department be required to be present and to produce all their records, statements or witnesses, reports or investigations, and all facts and exhibits in their possession, or under their control, pertaining to this case. (The files of the New York City Police Department would be particularly pertinent as in one of Mr. Bogin's statements, he denies that he had a gun). It is respectfully submitted that the very denial of him having been in possession of a gun is a basis for believing that there was some evidence that another gun was present at the scene and that Mr. Sogin possessed it. This would be reflected in New York City Police Department files or in the files of the F.B.I.

WHEREFORE, it is most respectfully demanded that this
Honorable Court direct that a new trial be had, or in the alternative, direct a full hearing as to the issues raised herein,
together with such other and further relief the Court may deem
just and proper.

MICHAEL J. GILLEN

Sworn to before me this 20 day of August, 1974

NORMAN TURING NEED PARKET STATE OF NORMAN TURING NORMAN TU

RENEWED MOTION DATED MARCH 12, 1974

or

A FULL HEARING

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
----X
JOSEPH TREMARCO,

Petitioner,

73C 317

-against-

ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK, DISTRICT ATTORNEY FOR KINGS COUNTY, STATE OF NEW YORK, POLICE DEPARTMENT OF THE CITY OF NEW YORK, STATE OF NEW YORK, FEDERAL BUREAU OF INVESTIGATION, and WARDEN, GREENHAVEN CORRECTIONAL FACILITY, STORMVILLE, NEW YORK,

Respondents.

SIR:

de.

PLEASE TAKE NOTICE, that upon the annexed affidavit of MICHAEL J. GILLEN, ESQ., duly sworn to the 11 day of March 1975, and upon all of the prior proceedings had herein including the petition for writ of habeas corpus filed before this Honorable Court, the undersigned will move this Court before the Hon. Mark A. Costantino, United States District Judge, Eastern District of New York, on the 21st day of March, 1975, in the United States Courthouse at 225 Cadman Plaza East Borough of Brooklyn, City and State of New York, at 10 o'clock in the forenoon of that day or as soon thereafter as Counsel can be heard, for an Order granting JOSEPH TREMARCO, petitioner herein, a new trial or for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York, March 12, 1975

Yours, etc.,

MICHAEL J. GILLEN

GRUNEWALD, TURK, GILLEN & FORD Attorneys for Petitioner 233 Broadway New York, New York 10007 Tel.: 964-1400 LOUIS J. LEFKOWITZ
Attorney General of the State of New York
World Trade Center
New York, New York 10047

DALID TRAEGER
United States Attorney for Eastern
District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

EUGENE GOLD
District Attorney for the County of Kings
Municipal Building
Brooklyn, New York 11201

ADRIAN P. BURKE Corporation Counsel of City of New York Municipal Building New York, New York

MICHAEL CODD Commissioner of Police Dept. of City of N.Y. 1 Police Plaza New York, New York

WARDEN
Greenhaven Correctional Facility
Stormville, New York

AFFIDAVIT OF MICHAEL J. GILLEN, IN SUPPORT OF MOTION FOR A NEW TRIAL, etc.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JOSEPH TREMARCO.

Petitioner,

-against-

ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK, DISTRICT ATTORNEY FOR KINGS COUNTY, STATE OF NEW YORK, POLICE DEPARTMENT OF THE CITY OF NEW YORK, STATE OF NEW YORK, FEDERAL BUREAU OF INVESTIGATION, and WARDEN, GREENHAVEN CORRECTIONAL FACILITY, STORMVILLE, NEW YORK,

73C 317

Respondents.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MICHAEL J. GILLEN, being duly sworn, deposes and says: He is the attorney for the petitioner, JOSEPH TREMARCO.

Previously hereto, petitioner moved this Honorable Court for a Writ of Habeas Corpus (73C 317) for relief in connection with his conviction before the Hon. John A. Monteleone, Justice of the Supreme Court, County of Kings, State of New York.

On September 19, 1974, petitioner, by his counsel, appeared before this Honorable Court on a motion for a new trial and/or a nearing to determine whether a new trial should be ordered. At that time, the motion for a Writ of Habeas Corpus was marked off pending the filing and determination of a motion for a new trial before the Hon. John A. Monteleone, (see minutes 9/19/74, pages 12-13).

On November 15, 1974, a motion for a new trial was made returnable in Supreme Court, Kings County, before Justice Monteleone (Exhibit "A" annexed). On November 25, 1974, an affirmation in opposition to the motion was executed and filed by Assistant

District Attorney Richard C. Lackey, of the Rings County District Attorney's Office (Exhibit "B" annexed). Subsequently, an affidavit in rebuttal by deponent was executed and filed on December 2, 1974 (Exhibit "C" annexed). There are no stenograph minutes pertaining to this motion.

Justice Monteleone denied petitioner's motion for a new trial by Memorandum dated December 18, 1974 (Exhibit "D" annexed) which denial was entered January 6, 1975 (Exhibit "E" annexed).

Thereafter, a motion for a certificate pursuant to §460.15 of the Criminal Procedure Law of the State of New York granting permission to appeal to the Appellate Division, Second Department, from Judge Monteleone's denial of the motion for a new trial was made returnable on February 7, 1975 (Exhibit "F" annexed).

On March 3, 1975, the motion for the aforesaid certificate was denied by Mr. Justice Martuscello of the Appellate Division (Exhibit "G" annexed).

It is respectfully requested that all segments of the original motion for a Writ of Habeas Corpus be restored, and that a new trial be ordered or in the alternative, a full evidentiary hearing be ordered.

MICHAEL J. GILLEN

Sworn to before me this

Confidence is in Maria County

Lectures 2. Vineseny

MEMORANDUM AND ORDER BRUCHHAUSEN, D.J.
DATED JUNE 18, 1975

JOSEPH TREMARCO,

Petitioner,

-against-

THE ATTORNEY GENERAL OF THE UNITED STATES, THE UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK, THE DISTRICT ATTORNEY FOR KINGS COUNTY, et al.,

: No. 73 C 317

June 18, 1975

Respondents.

MEMORANDUM and ORDER

BRUCHHAUSEN, D. J.

The petitioner has filed an application for a Writ of Habeas Corpus, dated August 24, 1974. This motion was subsequently marked off the calendar on September 19, 1974, and thereafter renewed on March 13, 1975 after the exhaustion by the petitioner of all State remedies.

The factual background of this case has been fully set forth in a memorandum and order of the Hon.

Mark Costantino, dated May 24, 1973.

The petitioner was indicted for the alleged crimes of attempted murder, assault in the first degree, and possession of a machine gun. He was tried before the Hon. John A. Montelone and jury and convicted on all counts, charged in the indictment. Thereafter all state appellate procedures were instituted, and the conviction upheld. The present petition was then filed for a Writ of Habeas Corpus.

In substance this application is that the defense was denied use of certain F.B.I. reports which contained information given by one Harry Bogin, the intended victim of the petitioner. It is claimed that said remarks contained in the reports and the testimony given during the trial of the petitions are inconsistant. The affidavit of Michael J. Gillen, Esq., sworn to the 7th day of November, 1974 states in part at page 9 thereof:

"The prior statements of Mr. Bogin would have been of incalculable value at trial in cross-examination and would have insured an acquittal."

The Court has carefully reviewed all the documents submitted, which also includes the F.B.I.

reports. The documents presented, together with the affidavits, fail to disclose any matter that may have been helpful to the petitioner or may have changed the jury verdict. The papers suggest that the petitioner's defense was an alibi, in that he was not present at the scene of the shooting. The jury disbelieved the petitioner's defense and accepted the testimony of Bogin who testified that the petitioner was the person who shot at the intended victim, Bogin. The assailant was identified during trial by the victim at the shoot-out. The arguments presented for a new trial on newly discovered evidence are purely speculative, and the Court is convinced that the present record establishes that the jury verdict would have been the same even though the defense had been furnished with the F.B.I. reports during the trial.

See United States ex rel. Rive v. Vincent,

491 F.2d 1326(1974)(Cir.2), and the cases cited therein.

Also United States v. Ruggiero, 472 F.2d 599(1973)(Cir.2).

It follows, therefore, that the petitioner's application is groundless, and the petition for a Writ

of Habeas Corpus is dismissed.

It is so ordered.

Copies hereof will be forwarded to the attorneys for the parties.

Simior U. S. D. J.

ORDER DATED JUNE 23, 1975 DISMISSING PETITION



UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

JOSEPH TREMARCO,

Petitioner,

-against-

THE ATTORNEY GENERAL OF THE UNITED STATES, THE UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK, THE DISTRICT ATTORNEY FOR KINGS COUNTY, et al.,

Respondents.

JUDGMENT

73 CF3LED IN CLEAK'S OFFICE U. S. DISTRICT COURT E.D. N.Y.

_ JUN 23 1974

TIME A.M....

A memorandum and order of the Honorable Walter

Bruchhausen, United States District Judge, having been filed on

June 18, 1975, denying the petition for a writ of habeas corpus

as being groundless, it is

ORDERED and ADJUDGED that the petitioner take nothing of the respondent and that the petition is dismissed.

Dated: Brooklyn New York
June 13 , 1975

Clark

NOTICE OF APPEAL

76a

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JOSEPH TREMARCO.

Petitioner-Appellant

-against-

ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK, DISTRICT ATTORNEY FOR KINGS COUNTY, STATE OF NEW YORK, POLICE DEPARTMENT OF THE CITY OF NEW YORK, STATE OF NEW YORK, FEDERAL BUREAU OF INVESTIGATION, and WARDEN, GREENHAVEN CORRECTIONAL FACILITY, STORMVILLE, NEW YORK,

73 C 317

Respondents-Appellees.

Notice is hereby given that the petitioner-appellant,

JOSEPH TREMARCO, hereby appeals to the United States Court of

Appeals for the Second Circuit from the Memorandum and Order,

dated June 18, 1975.

Dated: July 15, 1975

MICHAEL J. GILLEN

GRUNEWALD, TURK, GILLEN & FORD Attorneys for Petitioner-Appellant

233 Broadway

New York, New York 10007

STATE OF NEW YORK CITY OF NEW YORK COUNTY OF NEW YORK

Lloyd Christie being duly sworn, deposes and says, that he is over 18 years of age. That on the 3rd day of October 1975, he served the attached Appellant's Appendix as follows:

To:	Attorneys for Respondents-Appellees:	Amounts
	Louis J. Lefkowitz Attorney General of the State of New York 2 World Trade Center New York, New York 10047	2
	David Traeger United States Attorney for Eastern District of New York United States Courthouse 225 Cadman Plaza East Brooklyn, New York 11201	2
	Eugene Gold District Attorney for the County of Kings Municipal Building Brooklyn, New York 11201	1
	W. Bernard michland Corporation Counsel of City of New York Municipal Building New York, New York	1
	Michael Codd Commissioner of Police Dept. of City of N.Y. 1 Police Plaza New York, New York	1
	Warden Greenhaven Correctional Facility Stormville, New York	1
	Clarence B. Kelly Director, Federal Bureau of Investigation 506 Old Post Office Building Washington, D.C. 20535	1

the attorneys for the Respondents Appellees herein by depositing the same, properly enclosed on a securiey sealed post-paid wrapper, in a U.S. Post Office at 90 Church Street, New York City, directed to said attorneys at the afore mentioned addreses, that being the place where they maintain their offices for the regular transaction of business, and the last address mentioned in the papers last served by them

Sworn to before me this 3 day of October 1975

Notary Public State of New York

Commission Expires Warch 30, 197 7